

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Eric Utes,

Complainant,

v.

ORDER OF DISMISSAL

Minnesota Board of Physical Therapy,

Respondent.

On January 25, 2013, Eric Utes (Complainant) filed a Complaint with the Office of Administrative Hearings.

The Chief Administrative Law Judge assigned the matter to the undersigned Administrative Law Judge on that date. Copies of the Complaint were sent to the Respondent by facsimile transmission and certified mail on January 25, 2013. The Respondent filed a response to the Complaint on February 13, 2013.

Jonathan Geffen, Arneson & Geffen, PLLC, appeared on behalf of the Complainant, Eric Utes. Bryan D. Huffman, Assistant Attorney General, appeared on behalf of the Minnesota Board of Physical Therapy (the Board).

After reviewing the Complaint and the County's Response to the Complaint, the Administrative Law Judge has determined that the Complaint presents claims that cannot be reached by way of the expedited process under Minn. Stat. § 13.085.

Based upon the record and all of the proceedings in this matter, including the Memorandum below, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The Complaint is **DISMISSED**.
2. Because the costs of the Office of Administrative Hearings in connection with this matter did not exceed the amount of the filing fee, Mr. Utes is entitled to a partial refund of the filing fee under Minn. Stat. § 13.085, subd. 6 (d).
3. Because the Complaint has not been shown to have been frivolous in nature or to have been brought for the purposes of harassment,

the Board of Physical Therapy is not entitled to recover reasonable attorneys fees under Minn. Stat. § 13.085, subd. 6(e).

Dated: March 13, 2013

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 13.085, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings no later than five business days after the Complainant receives notice that the Complaint has been dismissed for failure to present sufficient facts to believe that a violation of Chapter 13 has occurred. If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear material error and grants the petition, the Chief Administrative Law Judge will schedule the complaint for a hearing under Minnesota Statutes § 13.085, subd. 4.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 13.085, subd. 5(d), and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

MEMORANDUM

Factual Background

Eric Utes is a physical therapist licensed by the Board. He received licensure in 2010, and has retained his license since that time. In 2011, Mr. Utes self-reported to the Board that he was adjudicated a delinquent in 1997, because of acts that he committed as a fifteen year-old. Mr. Utes had not disclosed this information as part of his original application for licensure.

The Board concluded that Mr. Utes' failure to disclose this information was a violation of Minnesota's licensing laws. As a result, the Board proposed to issue a written reprimand and asked Utes to enter into a Stipulation and Order detailing the basis for that reprimand.

The Board's first proposed Stipulation and Order identified Mr. Utes' juvenile matter as a "felony conviction."¹ Mr. Utes objected to this language on the ground that adjudication of delinquency by the juvenile court does not result in a "conviction." The Board staff agreed to substitute its reference to a "felony conviction" with the phrase "failed to disclose a 1997 adjudication, which occurred while [Mr. Utes] was a juvenile."²

Additionally, the finalized Stipulation and Order stated in part:

The Committee views Respondent's practices as inappropriate in such a way as to require Board action under Minn. Stat. § 148.75(a)(3) and (5) (2010). Respondent agrees that the conduct cited above constitutes a reasonable basis in law and fact to justify the disciplinary action under these statutes.³

In October of 2011, Mr. Utes signed this Stipulation and Order, and this same document was counter-signed a few weeks later by a representative of the Board.⁴

In its November 2012 Newsletter, the Board reported that Mr. Utes was disciplined by the Board because of a "conviction of a crime and [because he] obtained a license by deception."⁵

Mr. Utes avers that the Board is not willing to alter its characterization of the Stipulation and Order and that it plans to post a similar account of the matter on the Board's website.⁶

¹ Affidavit of Eric Utes, at Exhibit A.

² Utes Affidavit, at Ex. B.

³ *Id.*

⁴ *Id.*

⁵ Utes Affidavit, at Ex. B.

⁶ Utes Affidavit, at ¶¶ 9, 11 and 12.

Analysis

I. The Expedited Process and Accuracy and Completeness Claims

To the extent that Mr. Utes asserts that the Board must provide “‘reasonably correct’ data that is free from errors,” and that the Board has refused to correct inaccurate data as to him, he asserts an accuracy and completeness claim under the Data Practices Act.⁷

Minn. Stat. § 13.085, subd. 2 (a) provides that a complaint alleging a violation of the Minnesota Government Data Practices Act “for which an order to compel compliance is requested” may be filed with the Office of Administrative Hearings. Yet, exempted from this grant of authority, are actions to “pursuant to section 13.04, subdivision 4 or 4a.”

Minn. Stat. § 13.04, subdivision 4 and 4a, each relate to the procedures that the subjects of government data may use to “contest the accuracy or completeness of public or private data.”

Reading the two statutes together, it does not appear that a subject of data may use the expedited data practices process in order to challenge the “accuracy and completeness” of government data. Minn. Stat. § 13.04, subdivision 4 has special procedures for making an accuracy and completeness challenge. The statute provides:

(a) An individual subject of the data may contest the accuracy or completeness of public or private data. To exercise this right, an individual shall notify in writing the responsible authority describing the nature of the disagreement. The responsible authority shall within 30 days either: (1) correct the data found to be inaccurate or incomplete and attempt to notify past recipients of inaccurate or incomplete data, including recipients named by the individual; or (2) notify the individual that the authority believes the data to be correct. Data in dispute shall be disclosed only if the individual's statement of disagreement is included with the disclosed data.

The determination of the responsible authority may be appealed pursuant to the provisions of the Administrative Procedure Act relating to contested cases. Upon receipt of an appeal by an individual, the commissioner [of the Department of Administration] shall, before issuing the order and notice of a contested case hearing required by chapter 14, try to resolve the dispute through education, conference, conciliation, or persuasion. If the parties consent, the commissioner may refer the matter to mediation. Following these efforts, the commissioner shall dismiss the appeal or issue the order and notice of hearing.

⁷ Utes Memorandum of Law, at 4 (January 11, 2013).

The expedited process under section 13.085 is different than the contested case process under Chapter 14. A key difference is that the expedited process is initiated by way of a citizen complaint, instead of a Notice and Order for Hearing from the Minnesota Department of Administration.⁸

Because it appears that the Minnesota Legislature did not intend for the expedited process under section 13.085 to be available in cases of accuracy and completeness challenges, dismissal of the Complaint is the appropriate result.

II. Details of the Record Filed in this Matter

Before the parties reignite this litigation a second time, before the Commissioner of Administration, two features this case are worth close review. While Mr. Utes is correct that the finalized Stipulation and Order did not detail any particular acts of “deception,” the agreement states that regulatory discipline was warranted under Minn. Stat. § 148.75 (a)(5). The cited statute authorizes the Board to impose discipline upon license holders who have “obtained or attempted to obtain a license ... by fraud or deception.” At any later contested-case type hearing, therefore, the parties will likely clash over what was intended by their stipulation and what was written down. Resolving this controversy might not be simple or brief.

Thus, if it is drawn into a second round of litigation, the Board will need to carefully weigh whether labeling Mr. Utes as “deceptive” – a charge he vigorously denies – is worth the expense of a new hearing. A better result, and an agreed-upon set of disclosures to the public, might be obtained through conciliation or mediation.⁹

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⁸ See generally, *In Re Appeal of the Determination of the Responsible Authority for the Minnesota Office of the State Auditor That Certain Data Concerning Larry V. King are Accurate and/or Complete*, OAH Docket No. 11-0200-11426-2 (1998) (<http://mn.gov/oah/multimedia/pdf/020011426.sj.pdf>).

⁹ See e.g., Minn. Stat. §§ 13.04, subd. 4, and 14.59.